

83-2012-

Office - Supreme Court, U.S.

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JUN 6 1984

ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

THOMAS G. HEYWARD,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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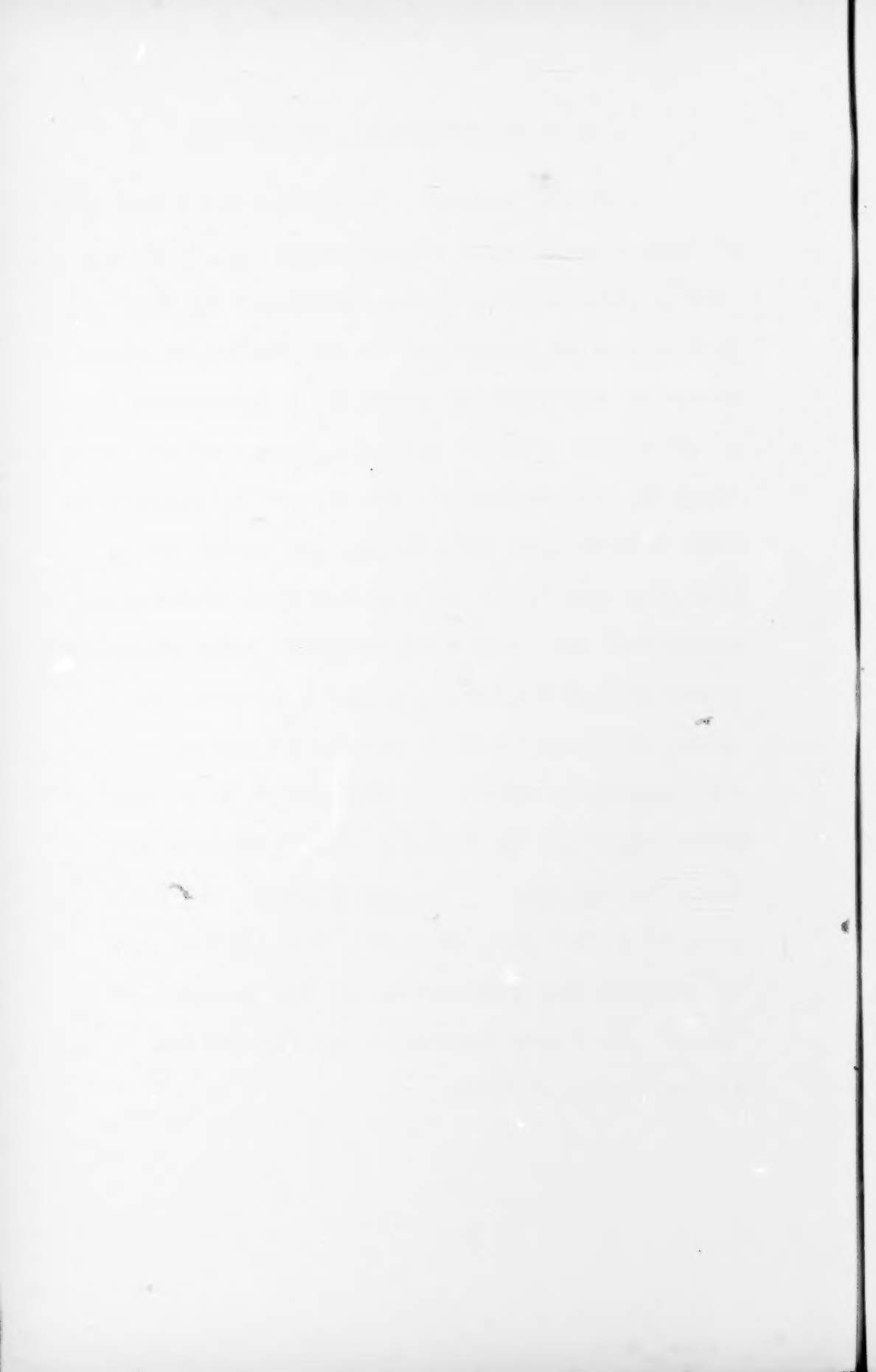
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50pp



QUESTION PRESENTED FOR REVIEW

Did the Fourth Circuit Court of Appeals violate Appellant's rights under the due process clause of the Fifth Amendment to the United States Constitution by admitting into evidence pursuant to proof of a violation of 26 U.S.C. §7201, testimony that an airplane owned by the Appellant was found in Georgia in 1980 loaded with marijuana, the error being that the admission of the evidence created a danger of unfair prejudice which substantially outweighed any probative value and was an abuse of discretion by the Trial Judge so fundamentally unfair in the proof of a "net worth case" as to violate the standards set forth in Holland v. United States, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954), and to violate the guaranties of due process of law of the Fifth Amendment to the United States Constitution?



LIST OF PARTIES

All parties are contained in the caption
of the case.



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Argument

THE FOURTH CIRCUIT COURT OF APPEALS VIOLATED THE APPELLANT'S RIGHT TO DUE PROCESS OF LAW GUARANTIED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY UPHOLDING THE ADMISSION INTO EVIDENCE TESTIMONY OF THE DISCOVERY OF A DRUG LADEN AIRPLANE AS PROOF OF A LIKELY SOURCE OF INCOME IN A "NET WORTH CASE," THE ADMISSION OF THIS EVIDENCE BEING IN VIOLATION OF THE STANDARDS OF PROOF AND SAFEGUARDS SET FORTH IN HOLLAND V. UNITED STATES, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954), AND BEING SO FUNDAMENTALLY PREJUDICIAL AS TO BE A DENIAL OF APPELLANT'S RIGHT TO DUE PROCESS OF LAW

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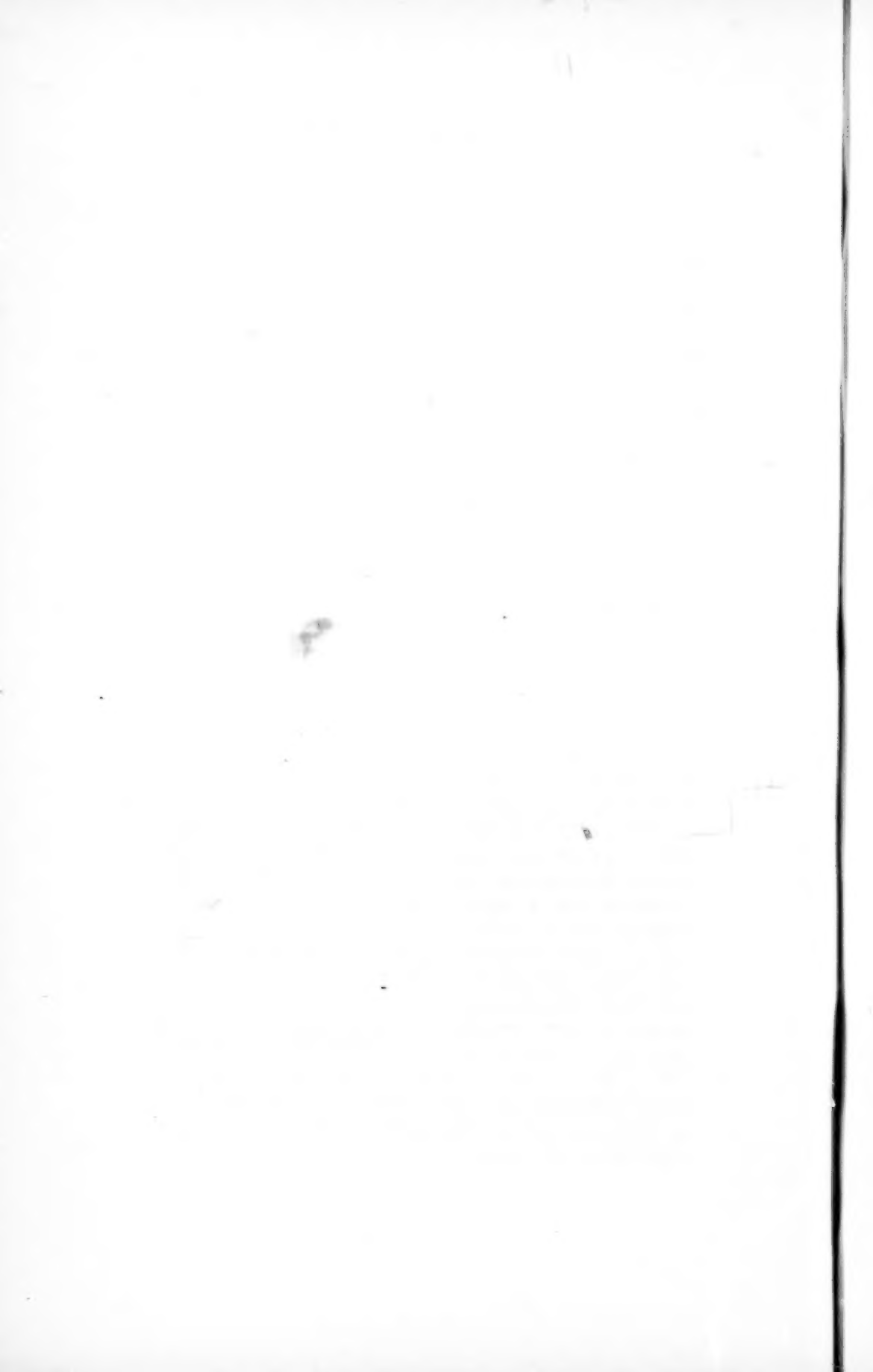


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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS
DELIVERED IN THE COURTS BELOW

A copy of the Judgment and Commitment of the United States District Court for the District of South Carolina dated May 27, 1982 is included in the Appendix at A-1.

A copy of the published opinion of the Fourth Circuit Court of Appeals dated March 5, 1984 is included in the Appendix at A-2.

A copy of the Order of the United States Court of Appeals for the Fourth Circuit filed April 13, 1984 denying the Appellant's Petition for Rehearing is included in the Appendix at A-3.

GROUND ON WHICH JURISDICTION OF THE
COURT IS INVOKED

The Appellant was convicted on March 12, 1982 on two counts of a violation of 26 U.S.C. §7201 and sentenced to two years imprisonment. In a published opinion dated March 5, 1984 the Fourth Circuit Court of



Appeals affirmed the conviction. Jurisdiction of the Supreme Court is invoked under Title 18, United States Code, §1254(1) (1976). The Appellant avers that errors committed by the Trial Judge and upheld by the Fourth Circuit Court of Appeals were a violation of the Appellant's right to due process of law as guaranteed by the Fifth Amendment to the United States Constitution and in violation of the standards of proof in a "net worth case" set forth in Holland v. United States, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954).

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

United States Constitution, Fifth Amendment.

Title 18, United States Code, §1254(1) (1976).

Title 26, United States Code, §7201.

Supreme Court Rule 17.1(a) and (c).

Federal Rules of Evidence, Rule 403.



STATEMENT OF THE CASE

On March 12, 1982 the Appellant was found guilty on two counts of a violation of 26 U.S.C. §7201. The first count charged the offense for the calendar year 1978 and the second count charged the offense for the calendar year 1979.

The prosecution's case rested on the "net worth theory," proceeding on the establishment of a likely source of income. United States v. Massei, 355 U.S. 595, 78 S.Ct. 495, 2 L.Ed.2d 517 (1958). The prosecution was able to convince the jury that the Appellant's increase in net worth was attributable to drug smuggling activities.

The Judge sentenced the Appellant as to count one to the custody of the United States Attorney General for a period of two years or until otherwise discharged by due process of the law. As to count two, the Trial Judge sentenced the Appellant to the

custody of the United States Attorney General for two years, the execution of the institutional sentence being suspended and the Appellant was sentenced to three years probation.

During the course of the trial, the prosecution offered into evidence testimony that an airplane owned by the Appellant was found in Georgia in 1980 loaded with marijuana. This testimony was offered as a likely source of income in proof of the prosecution's "net worth case."

Counsel for the Appellant objected to this testimony on the grounds that the danger of unfair prejudice arising from the testimony would substantially outweigh any probative value and would be an abuse of the discretion of the Trial Judge under the guidelines set forth in the Federal Rules of Evidence Number 403. The Appellant was neither arrested nor convicted of drug smuggling charges.

The airplane was the only evidence in the record in any way tending to implicate the Appellant in an illegal activity which would tend to prove a likely source of income. The Trial Judge observed that this evidence was the heart of the government's case, without which the government's proof would fail (Joint Appendix, p. 28).

If I am correct in my appraisal of the law, if, in fact, the government is required to prove by the greater weight or preponderance of the evidence a likely source, and if all they have got to put up is what they are telling me they are going to put up, and that is this airplane and the surrounding testimony as a likely source, then I've got to direct a verdict for the Defendant if I don't let it in.

The evidence was admitted over the Appellant's objection and the Appellant was subsequently convicted. The conviction was upheld by the Fourth Circuit Court of Appeals in a published Order dated March 5, 1984, the Fourth Circuit Court of Appeals

holding in part that the admission of the testimony of the airplane was not an abuse of the Trial Judge's discretion and that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

The Appellant filed a Petition for Rehearing with the Fourth Circuit Court of Appeals on the grounds that the Court overlooked or misapprehended points of law or fact in its determination that the probative value of the evidence of the airplane was not substantially outweighed by the danger of unfair prejudice to the Appellant.

The Appellant's Petition for Rehearing addressed circumstances used by the Court to draw the inference that the Appellant was engaged in drug smuggling during the indictment years. The Court, having drawn this conclusion, upheld the admission of testimony that an airplane owned by the Appellant was found loaded with marijuana in

the State of Georgia in 1980 as a likely source of income for the years 1978 and 1979.

On pages 10, 11 and 12 of the Fourth Circuit Court of Appeals Opinion, the Court recites circumstances from which a conclusion is reached that Appellant's plane had been involved in a number of previous clandestine trips. Each circumstance is explained by the record.

The Opinion states that the Appellant was the record owner of the plane and presented no evidence that it had been stolen.

(Opinion, p. 11, emphasis added). The record establishes that the plane was found abandoned in Georgia. No one was put on the stand to testify that he stole the plane. When the thief is unknown and the stolen property abandoned, it is difficult to conceive of evidence of the theft other than statements by the owner and others that the plane was stolen. If the owner were required to take the stand and testify he would be deprived of his

Constitutional rights. There is testimony in this record, to which no reference is made in the Court's Opinion, that the plane was stolen and that it was reported stolen. (TR., p. 347). There is testimony that another plane owned by the Appellant had been stolen in the recent past and that an attempted theft of a third plane had occurred. (TR., pp. 331, 344).

The plane was last seen by the Appellant at the Hilton Head Airport on Saturday, February 2, 1980. (TR., pp. 318, 447). The plane left for Florida for radio repairs. (TR., p. 320). In the early morning of Monday, February 4, 1980, the plane was seen taking off in the dark from the Hilton Head Airport. (TR., p. 342). During the day of February 4, 1980, the Appellant called an employee to find out if the plane had returned from Florida. (TR., p. 320). The plane had been gone for three days. There is no evidence in the record to suggest that the Appellant knew the plane had returned and

left clandestinely. These facts are as consistent with the theory that the plane was stolen as with any other conclusion. It is reasonable that the Appellant would be concerned about the whereabouts of his plane which, to his knowledge, had not returned from Florida.

The Court cited the fact that mosquito spraying tanks had been modified so that fuel could be stored, thus extending the range of the plane, in support of the conclusion that the plane had been used for many clandestine trips. The record is clear that the spraying system, as originally installed, complied with the normal method of installation and was the best available. (TR., p. 455). It is undisputed that the mosquito spraying system was not modified for use with fuel until after January 15, 1980. David Arnold testified that he inspected the spraying system in May of 1979 and January of 1980 and found no conversion on either

date. (TR., pp. 473, 476).

Whatever conclusion may be drawn from the conversion of the spraying system it is improper to draw any conclusion which affects the years 1978 or 1979. The modification was made in 1980, was a makeshift job and was very dangerous. (TR., pp. 417, 418). The conversion occurred after January 15, 1980 and before the plane was found on February 5, 1980. The only reasonable conclusion to be drawn from this is that the conversion was for a one time trip and could have been done as easily by a thief as anyone. There is certainly nothing in this record to connect the Appellant with this conversion.

The Court also pointed to the testimony concerning 15,000 to 20,000 gallons of fuel allegedly missing during 1976, 1977, 1978 and the overnight disappearance of 1600 gallons of fuel. It should be noted that this testimony came from a former bookkeeper of the Appellant whose relationship with the

Appellant was not good. (See pp. 332, 437 and 438).

The bookkeeper used cash receipts and cash disbursements to arrive at her conclusion concerning missing fuel. (TR., pp. 329, 330). Her calculations were made in 1979, after the fact. (See TR., pp. 312, 328, 329). The bookkeeper's calculations did not take into consideration fuel lost due to spillage, evaporation, petty theft and, most importantly, uncharged transfers to other corporations owned by the Appellant and used for charters and other related business activities.

Joe Vines, a lineman who worked for the Appellant testified that his duties included fueling aircraft and that he knew nothing of 15,000 to 20,000 gallons of missing fuel. Because of inaccuracies in reporting the amount of fuel pumped and the daily closing meter readings, it often appeared on paper that there was a discrepancy of as much as 15 to 20 gallons per day.

(TR., pp. 433, 434). This testimony alone explains a 15,000 to 20,000 discrepancy on paper over 3 years.

As to the disappearance of 1600 gallons overnight, Mr. Vines explained that the discrepancy was due to a fuel filter test conducted by the fuel vendor. (TR., pp. 435, 436). The fuel was circulated from the storage tank to the pumping tank and then pumped back into the storage tank. This increased the output reading on the storage tank, but actually the same amount of gas was pumped back into the tank. (TR., pp. 435, 436).

There are reasonable and proper explanations for each circumstance. All of the circumstances cited by the Court have reference to 1980 with one exception; the missing fuel from 1976 to 1978. This circumstance was completely explained. Viewed independently of the airplane, there are no circumstances suggestive of criminal

activity as a likely source of income. Because of this the Appellant argued that admitting the testimony regarding the airplane loaded with drugs as the only evidence of a likely source of income was extremely prejudicial.

The Appellant's Petition for Rehearing was denied on April 13, 1984.

ARGUMENT

The Fourth Circuit Court of Appeals violated the Appellant's right to due process of law guaranteed by the Fifth Amendment to the United States Constitution by upholding the admission into evidence testimony of the discovery of a drug laden airplane as proof of a likely source of income in a "net worth case," the admission of this evidence being in violation of the standards of proof and safeguards set forth in Holland v. United States, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954), and being so fundamentally prejudicial as to be a denial of Appellant's right to due process of law.

In Holland v. United States, *supra*, the Supreme Court recognized the dangers in the proof of a "net worth case" and concluded,

The method involved something more than the ordinary use of circumstantial evidence in the usual criminal case. Its bearing, therefore, on the safeguards traditionally provided in the administration of criminal justice called for a consideration of the entire theory.

This admonition was to caution trial judges regarding the admission of circumstantial evidence in a "net worth case." The Supreme Court goes further in the Holland case and cautions that, "the 'net worth method' is so fraught with danger for the innocent that courts must closely scrutinize its use."

Under the guidelines and standards established in the Holland case, courts must,

exercise great care and restraint in dealing with proof of a "net worth case." In addition, Appellate Courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is a chief weapon of a method that is itself only an approximation.

In United States v. Johnson, 319 U.S. 503, 63 S.Ct. 1233, 87 L.Ed 1546 (1943), the Supreme Court approved using the "net worth method" to support the inference that a taxpayer who was involved in gambling operations received substantial unreported

income from these activities. Here, the inference that the illegal activities gave rise to unreported income was supported by direct evidence of Johnson's gambling activities. The fact that Johnson was engaged in gambling operations was not in itself drawn as an inference from circumstantial evidence. Indeed, the Court stated that the long duration of the gambling business, substantial evidence of the operation of the law of probabilities in favor of gambling houses, and the records as to private banking facilities for these operations made it not a matter of tenuous speculation, but of solid proof that there were winnings of a substantial amount which Johnson did not report.

The Court recognized the necessity of solid proof and the danger of tenuous speculation in a "net worth case."

In the case at hand, the Trial Judge admitted into evidence testimony that a plane owned by the Appellant was found in

Georgia in 1980, loaded with marijuana. Given this, the prosecution introduced circumstantial evidence from which the inference could be drawn that the Appellant was engaged in drug smuggling activities in 1978 and 1979. From this circumstantial evidence, the prosecution asked the jury to draw the inference that the Appellant had participated in illegal drug smuggling activities and further, to draw the inference that the Appellant had substantial unreported income from these drug related activities. There is no direct evidence that the Appellant had any involvement with drug smuggling activities.

In the Johnson case, supra, there was direct and substantial evidence closely associating the Defendant, Johnson, with illegal gambling activities that would give rise to unreported income. A likely source, i.e., the gambling operations, was established by direct proof not by inference. As to the Appellant, there is no direct evidence or

solid proof that Appellant was engaged in any illegal activity sufficient to support the inference that he received unreported income. The likely source of income, illegal drug activity, is based only on an inference drawn from circumstantial evidence.

Having admitted testimony regarding the fact that an airplane belonging to the Appellant was found in Georgia loaded with marijuana in 1980, the jury was required to infer that because the plane was owned by the Appellant he must have been involved in illegal drug smuggling. From this, the jury must infer that the Appellant received unreported income in 1978 and 1979 from drug related activity. Therefore, Appellant's conviction for violation of 26 U.S.C. §7201, is supported only by an inference based upon an inference. Both inferences lack the requisite solid proof as set forth in Johnson, supra. The Appellant argues that both inferences are tenuous speculation arising from the unfair prejudice

created by the admission of testimony of the airplane. As stated in Massei v. U. S., 241 F.2d 895,

inroads upon the enunciated net worth safeguards can only result in forcing the accused to prove he is innocent, an inherent danger of the "net worth theory."

Proving the "net worth case" by an inference based upon an inference is certainly an inroad upon the safeguards enunciated by the Supreme Court in "net worth cases."

Admitting circumstantial evidence of this nature from which an inference of criminal activity is drawn, creates more than a potential for extreme unfair prejudice in a "net worth case." It is unquestionable that this evidence could mislead the jury. The guaranties of due process afford each defendant those protections necessary for a fair trial. The admission of this type of evidence, in a "net worth case," may put the defendant to the burden of proving his innocence contrary to the protections of the due process

clause of the Fifth Amendment to the United States Constitution.

In evaluating whether the probative value (relevance) of the evidence complained of substantially outweighed the unfair prejudice to the Appellant, the Trial Judge reasoned that if he excluded the evidence in question, the prosecution would not have a case and therefore, the evidence was "...very relevant. It is of substantial relevance. It goes to the very heart of the government's case." (Joint Appendix, p. 28).

Viewed in light of the guidelines and warnings of the Supreme Court as to proof in a "net worth case," it cannot be argued that evidence is made more relevant or of more probative value simply because it is the only evidence that the prosecution has. Once testimony as to the airplane owned by the Appellant was allowed, it is readily apparent that the jury could draw the inference that the Appellant was engaged in illegal activity.

Establishing illegal activity as a likely source of income in a "net worth case" by inference rather than by direct or solid proof has the utmost potential for unfair prejudice to the Appellant. The probative value of the evidence must stand on its own. If the evidence only gives rise to an inference, it is of little probative value in a "net worth case" according to the guidelines set forth in Holland, Johnson and Massei, supra.

This reasoning applies even if it is the only evidence the prosecution has. The weakness of the prosecution's case and the lack of sufficient evidence to directly and substantially prove a likely source of income should not be used as unfair leverage in balancing the probative value of the submitted testimony versus the unfair prejudice arising therefrom.

The "net worth theory" inherently subjects the Defendant to fundamental unfairness because of the method of proof,

unless safeguards are utilized. Holland, supra. Constitutional guaranties of the Defendant must be as zealously guarded in a tax evasion case based upon the "net worth theory" as they are in other criminal cases. Massei, supra. Failing to exercise precaution and judicial discretion to protect the Defendant in a "net worth case" is a violation of the Defendant's right to due process of law under the guidelines set forth in Holland, Johnson and Massei, supra. An inference based upon an inference is sheer viciousness when it involves a question of liberty.

In upholding the admission of the evidence complained of, the Fourth Circuit Court of Appeals has ignored these guidelines and violated the Defendant's right to due process of law guaranteed under the Fifth Amendment to the United States Constitution.

CONCLUSION

The Court below has decided a federal question in a way that conflicts with applicable decisions of this Court and in violation of the Appellant's right to due process of law as guarantied by the Fifth Amendment to the United States Constitution. The Petitioner requests that this Court issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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May 30, 1984

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

United States of America

vs.

DEFENDANT: THOMAS G. HEYWARD

DOCKET NO.: 82-00009 (Indictment)

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of
the attorney for the
government the defen-
dant appeared in
person on this
date

Month Day Year
May 16, 1982

COUNSEL

____ WITHOUT COUNSEL

However the court advised
defendant of the right to
counsel and asked whether
defendant desired to have
counsel appointed by the court
and the defendant thereupon
waived assistance of counsel

XX WITH COUNSEL

Randolph Murdaugh, III, Retained

(Name of Counsel)

PLEA

_____ GUILTY, and the court being
satisfied that there is a
factual basis for the plea,

_____ NOLO CONTENDERE,

XX NOT GUILTY

There being a verdict of

—	NOT GUILTY, Defendant is discharged
X —	GUILTY, returned by Jury on March 12, 1982, as to Counts 1 & 2, (all)

FINDINGS & JUDGMENT

Defendant has been convicted of the offense(s) of violation of Section 7201, Internal Revenue Code; 26 U.S.C., Section 7201

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant.

SENTENCE guilty as charged and convicted and
OR ordered that: The defendant is
PROBA- hereby committed to the custody of
TION the Attorney General or his authorized
ORDER representative for imprisonment for
a period of two (2) years or until
otherwise discharged by due process
of law as to Count 1. As to Count
2, the defendant is hereby committed
to the custody of the Attorney
General or his authorized representa-
tive for imprisonment for a period
of two (2) years; the execution of
the institutional sentence is sus-
pended and the defendant placed on

probation for a period of three (3) years.

Defendant to report to institution upon designation by United States Marshal.

SPECIAL
CONDI-
TIONS
OF
PROBA-
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ADDI-
TIONAL
CONDI-
TIONS
OF
PROBA-
TION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMIT-
MENT
RECOM-
MENDA-
TION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY:

XX U.S. District S/C. Weston Houck
Judge C. WESTON HOUCK

U.S. Magistrate Date: May 27, 1982

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-5183

United States of America,

Appellee,

v.

Thomas G. Heyward,

Appellant.

Appeal from the United States District Court
for the District of South Carolina, at
Charleston. C. Weston Houck, District Judge.
(82-9)

Argued June 10, 1983

Decided March 5, 1984

Randolph Murdaugh, III (John W. Hendrix,
Roberts Vaux on brief) for Appellant; Wells
Dickson, Assistant United States Attorney
(Henry Dargan McMaster, United States Attor-
ney on brief) for Appellee.

* Honorable Frank W. Bullock, Jr., United
States District Judge for the Middle Dis-
trict of North Carolina, sitting by desig-
nation.

BULLOCK, District Judge:

Thomas G. Heyward was convicted in March, 1982, in a trial by jury, of two counts of income tax evasion in violation of 26 U.S.C. §7201. The government's case rested on the net worth theory of proof, which requires either a negating of all the possible nontaxable sources of the defendant's net worth increases over the years in question, or the establishment of a "likely source" of income. United States v. Massei, 355 U.S. 595, 78 S.Ct. 495, 2 L.Ed.2d 517 (1958). The instant case proceeded along the latter route, with the government convincing the jury that Heyward's increases in net worth were attributable to drug-smuggling activities.

I.

Heyward's defense was that any increase in net worth was due to a \$175,000.00 loan he received from a man named Robert Horan, who died before these proceedings began. Horan's widow, business partner, and accountant each

testified, however, that Horan did not have access to that amount of cash, that it would have been impossible for him to make that sizeable a loan, and that they had never heard of Heyward before. Heyward could present no note evidencing the indebtedness and claimed that the funds had been kept in a strongbox under his bed.

During the trial Heyward's attorney attempted to introduce into evidence a memorandum from the files of the deceased attorney who had handled Horan's estate, Robert O. Bowden. The memorandum, signed "R.O.B.," stated:

After several calls to various people . . . , it turns out that Bob Horan had a Navajo B which he owned with Gary Scott and goes under the numbers of 33FZ. They also thought he had a Navajo Chieftan at Grumman American under the numbers 80 RS or 80RJ, but it may have been sold about a week before he died. In conjunction with that, Savannah Bank reported to the FBI that he came in with \$100,000 cash and turned it into a cashier's check payable to the C&S Bank, and this would conform with the indebtedness situation on his plane which he probably paid off.

In response to the prosecution's hearsay objection, Heyward's attorney claimed that the memorandum satisfied Fed. R. Evid. 804(b)(5), the residual hearsay exception. That rule states:

Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes it known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

The trial judge refused to admit the memorandum into evidence, principally on the ground that counsel had not given the prose-

cution the required advance notice,¹ but also because he questioned whether it was more probative than other reasonably available evidence.

We decline to extend the residual hearsay exception to the memorandum in question for the latter reason. We are mindful that Rule 804(b)(5) was not written to be used as a "new and broad hearsay exception," Fong v. American Airlines, Inc., 626 F.2d 759, 763 (9th Cir. 1980), but was meant to be

¹Courts have generally construed the notice requirements of 804(b)(5) and its companion rule 803(24) strictly. See, e.g., United States v. Atkins, 618 F.2d 366, 372 (5th Cir. 1980); United States v. Ruffin, 575 F.2d 346, 358 (2d Cir. 1978). When new evidence is uncovered on the eve of trial, however, advance notice is obviously impossible. Recognizing that practical realities in this instance bar compliance with the letter of the rule, at least one court has granted a continuance to allow the party entitled to advance notice an opportunity to prepare to meet the evidence. United States v. Bailey, 581 F.2d 341, 348 (3d Cir. 1978); 4 J. Weinstein and M. Berger, Weinstein's Evidence 803-294 (1982) (continuance is the proper remedy); see also Fed. R. Evid. 102 ("These rules shall be construed to secure fairness in administration . . . to the end that the truth may be ascertained . . .").

"invoked sparingly." Robinson v. Shapiro, 646 F.2d 734, 742 (2d Cir. 1981). Accord Huff v. White Motor Corp., 609 F.2d 286, 291 (7th Cir. 1979). The legislative history of the rules puts it more strongly: "It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances." Fed. R. Evid. 803 Senate committee note (quoted in United States v. Kim, 595 F.2d 755, 765 [D.C. Cir. 1979]). Those exceptional circumstances are lacking here, for the Horan memorandum fails to meet the requirement of 804(b)(5)(B) that it be "more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts."

Testimony by an officer of Savannah Bank would quite clearly be more probative of Horan's possession of \$100,000.00 than is the file memorandum of the late Mr. Bowden. Bowden procured this information through a telephone call, and it hardly seems unduly

burdensome to require defendant's counsel to duplicate that feat. The trial judge granted a recess to allow defendant's counsel to obtain this testimony, but the issue was not raised again the next morning, and we can only conclude that defense counsel himself questioned the value of the testimony.

Other courts have been equally loath to apply the residual hearsay exception when it would not be difficult to go behind the proffered hearsay to reach more solid evidence. In United States v. Kim, 595 F.2d 755 (D.C. Cir. 1979), for example, defendant attempted to introduce a telex from his bank in Korea regarding \$400,000.00 which he had on deposit there. Defendant's aim was to prove that he had other sources of funds and would not have accepted money to bribe members of Congress. The court refused to apply the residual hearsay exception, stating "[m]uch stronger evidence of alternative sources of income would be the actual business records reflecting the

profitable business activities which produced that income, or testimony from business partners, employees and accountants as to the actual income source in some active business of Hancho Kim." Id. at 766. See Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1264-65, (E.D. Pa. 1980); In re Sterling Navigation Co., 444 F. Supp. 1043, 1046-47 (S.D.N.Y. 1977).

II.

Heyward next claims that the Horan memorandum constitutes exculpatory material which the government had a duty to turn over to him under the rule of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Assuming for the sake of argument that the prosecution had possession of the memorandum prior to trial, Brady has never been interpreted to require a prosecutor to throw open his files to opposing counsel. A prosecutor does not have "a constitutional

obligation to disclose any information that might affect the jury's verdict." United States v. Agurs, 427 U.S. 97, 108, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Thus every failure to make a disclosure is not reversible error.

The standard by which a prosecutor's failure to turn over allegedly exculpatory material must be judged is one of materiality. The United States Supreme Court has framed the question in terms of the strength of the evidence: "[I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed." Id. at 112. We thus turn to the Horan memorandum to determine whether its evidentiary impact would have risen to this level.

The Horan memorandum states merely that Horan had apparently sold one of his aircraft and had entered the Savannah Bank with \$100,000.00 in cash, the proceeds from

that sale, which he converted to a cashier's check made out to the lienholder on that aircraft. It makes no connection between Horan and the defendant, evidence of which was also entirely lacking at trial. It does not establish that Horan had access to large amounts of cash which he might conceivably have lent to the defendant. In short, we do not find the Horan memorandum to be so probative of Heyward's innocence that it should be considered error for the prosecution not to have disclosed it.

III.

Heyward's final contention is that the trial court erred in admitting into evidence that his plane was found in Georgia loaded with over 4,000 pounds of marijuana. This evidence was an integral part of the government's proof that Heyward's additional income had come through drug smuggling. Heyward's principal objection appears to be that there is insufficient evidence to link

him to the plane's cargo.² We find this argument unpersuasive. Heyward was the record owner of the plane and presented no evidence that it had been stolen. In fact, one day before its recovery by state agents in Georgia, Heyward asked one of his employees if the plane had returned. Other evidence also led to the conclusion that the plane was being used for illicit purposes. The plane was allegedly used for mosquito spraying, but the tanks for the insecticide opened into the main fuel tanks, giving the plane a range far greater than that needed for its purported

² Heyward also contends that this evidence was "more prejudicial than probative," an allusion to Rule 403, Fed. R. Evid., under which relevant evidence may be excluded if the trial court finds that "its probative value is substantially outweighed by the danger of unfair prejudice." The trial court has wide discretion in this area, however, and its determination will not be overturned except under the most "extraordinary" of circumstances. United States v. MacDonald, 688 F.2d 224, 227-28 (4th Cir. 1982), cert. denied, U.S. , 103 S.Ct. 726 (1983). We find no such circumstance in the present case.

purpose. Hilton Head Air Service, a corporation owned by Heyward, purchased approximately 15,000 to 20,000 gallons more fuel than they had recorded selling during 1976-78 and no explanation was provided for its disappearance. On one instance in January 1980, the corporation was missing 1,600 gallons from the close of business one night to its opening the next morning. These circumstances suggest a number of previous clandestine trips by Heyward.

Heyward also argues that the trial court erred in allowing the government to introduce evidence of the discovery of the drug-laden plane in 1980 to substantiate its net worth claims for 1978 and 1979. We do not find the discovery of the plane in February 1980 to be so temporally remote from the two previous years which were the subject of this indictment as to render the evidence inadmissible. See, e.g., Beard v. United States, 222 F.2d 84, 92 (4th Cir.)

(discovery of gambling equipment on defendant's premises in 1945 admissible in net worth case in 1944), cert. denied, 350 U.S. 846 (1955). The time difference was simply a matter to be considered by the jury. See United States v. Wright, 667 F.2d 793, 800 (9th Cir. 1982).

As there was no reversible error in the trial court proceedings, the appellant's conviction is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-5183

United States of America,

Appellee,

versus

Thomas G. Heyward,

Appellant.

O R D E R

Upon consideration of the appellant's
petition for rehearing, by counsel,

IT IS ORDERED that the petition for
rehearing is DENIED.

Entered at the direction of Judge
Bullock, U.S. District Judge, with the
concurrences of Judge Russell and Judge
Murnaghan.

For the Court,

WILLIAM K. SLATE, II
CLERK

FIFTH AMENDMENT TO THE
UNITED STATES CONSTITUTION

No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

18 U.S.C. §1254(1)

§1254. Court of appeals; certiorari; appeal;
certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

1. By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

26 U.S.C. §7201

§7201. Attempt to evade or defeat tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

SUPREME COURT RULES 17.1.(a) and (c)

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power by supervision.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

FEDERAL RULES OF EVIDENCE, RULE 403

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

